

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to Florence County  
Thomas A. Russo, Circuit Court Judge

---

RECEIVED

NOV - 4 2013

S.C. Supreme Court

DEVODUS ROUSE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2013-000474

---

PETITION FOR WRIT OF CERTIORARI

---

SUSAN B. HACKETT  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

TRISTAN M. SHAFFER  
*Pro Bono*  
P.O. Box 176  
Chapin, S.C. 29036

ATTORNEY FOR PETITIONER

INDEX

INDEX.....1

ISSUES PRESENTED.....2

STATEMENT.....3

ARGUMENT.....4

**I.** In violation of Petitioner’s right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution, trial counsel failed to object to the trial court instructing the jury that it could consider the lesser-included offense of voluntary manslaughter where no evidence existed to support a verdict of the offense.....4

**II.** Petitioner’s conviction for voluntary manslaughter violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution where the record contains no evidence that Petitioner acted in the sudden heat of passion based upon sufficient legal provocation.....10

**III.** In violation of Petitioner’s right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution, trial counsel failed to request that the jury be instructed on the law of self-defense where evidence in the record indicated Petitioner acted in self-defense.....12

CONCLUSION.....21

## ISSUES PRESENTED

I. In violation of Petitioner's right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution, trial counsel failed to object to the trial court instructing the jury that it could consider the lesser-included offense of voluntary manslaughter where no evidence existed to support a verdict of the offense.

II. Petitioner's conviction for voluntary manslaughter violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution where the record contains no evidence that Petitioner acted in the sudden heat of passion based upon sufficient legal provocation.

III. In violation of Petitioner's right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution, trial counsel failed to request that the jury be instructed on the law of self-defense where evidence in the record indicated Petitioner acted in self-defense.

## STATEMENT

A Florence County grand jury indicted Petitioner for murder on April 10, 2008. App. 821 – 822. Petitioner was tried before the Honorable Ralph King Anderson, Jr. and a jury beginning on January 12, 2009. App. 1. Edgar Clements, III represented the state. H. Lee Herron represented Petitioner. App. 2. The jury found Petitioner guilty of the lesser-included offense of voluntary manslaughter. App. 238, lines 23-25. The judge sentenced Petitioner to twenty-five years' imprisonment. App. 263, lines 11-12; App. 823. Petitioner filed a timely notice of appeal. Joseph L. Savitz, III filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967) on the half of Petitioner. App. 676 – 685. In an unpublished opinion, the Court of Appeals dismissed Petitioner's direct appeal. State v. Rouse, Op.No. 2011 – UP – 274 (S:C. Ct. App. June 8, 2011). App. 686 – 687. The remittitur was sent on June 28, 2011. App. 688.

Petitioner filed an application for post-conviction relief on June 20, 2011. App. 689 – 714. The matter proceeded to an evidentiary hearing before the Honorable Thomas Russo on October 15, 2012. Tristan Schaffer represented Petitioner, and Tyson Andrew Johnson Sr. represented the state. App. 720. On November 6, 2012, Judge Russo denied Petitioner relief from his conviction and sentence. App. 794 – 799. Petitioner filed a timely motion to reconsider. App. 800 – 818. On February 6, 2013, Judge Russo denied Petitioner's motion to reconsider. App. 819 – 820.

Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

## ARGUMENT

I. In violation of Petitioner's right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution, trial counsel failed to object to the trial court instructing the jury that it could consider the lesser-included offense of voluntary manslaughter where no evidence existed to support a verdict of the offense.

### **Relevant facts**

#### Facts produced at trial

Petitioner is serving a twenty-five year sentence for voluntary manslaughter in a case where the state alleged that Petitioner killed decedent during an armed robbery. App. 134, lines 22-24; App. 155, line 5 – App. 157, line 7; App. 164, lines 2-6. All the evidence presented at trial supported one of the following theories: 1) Petitioner did not shoot decedent; 2) Petitioner made a conscious decision to shoot decedent after decedent pulled a gun on Petitioner; or 3) Petitioner shot decedent while trying to rob him.

At trial, defense counsel argued that Petitioner did not shoot decedent. Trial Counsel instead argued that some other person must have killed decedent. App. 178, line 7 – App. 185, line 16. This was supported by the fact that one of the state's star witnesses, Douglas Washington, was planning on robbing decedent. App. 412, line 23 – App. 413, line 11. Furthermore, decedent's gun was later found on a person with no ties to Petitioner. App. 416, line 24 – App. 417, line 4. Moreover, the state failed to present any physical evidence linking Petitioner to the shooting. App. 416, lines 11-15.

Two of the state's witnesses testified Petitioner told them the decedent pulled a gun on Petitioner and Petitioner shot him because it was "him or me." App. 74, lines 12-14; App. 339

lines 15-17. Despite this language, trial counsel declined to request a self-defense jury instruction. App. 125, lines 3 – App. 126, lines 25.

The state’s theory of the case was that Petitioner murdered decedent during an alleged armed robbery. The state called witnesses to try and establish that Petitioner had robbed decedent. App. 78, lines 9-14; App. 315, lines 4-19; App. 340, lines 5-20; App. 367, lines 18-25; App. 384, lines 16-21; App. 70, line 2 – App. 71, line 12; App. 751, lines 22-25.

During a charge conference the state requested a charge on the lesser-included offense of voluntary manslaughter. However, there was no evidence that Petitioner shot the decedent because he was enraged or incapable of cool reflection. Moreover, there was no evidence that showed Petitioner shot decedent while acting on an uncontrollable impulse to do violence. Defense counsel did not object even though he later admitted that there is no evidence to support a charge of voluntary manslaughter.

After several hours of deliberation and an Allen<sup>1</sup> charge, the jury convicted Petitioner of voluntary manslaughter.

#### Facts produced at the PCR hearing

At the post-conviction relief hearing, Petitioner argued that counsel was ineffective for failing to object to the voluntary manslaughter charge. App. 727, lines 9-14. Trial counsel testified that there was no evidence in the record to support the charge. App. 745, lines 9-11. However, Trial counsel choose not to object because he believed the voluntary manslaughter instruction, “really helped [Petitioner] because the jury came back with not guilty of murder, but found him guilty of voluntary manslaughter.” App. 746, lines 5-7.

---

<sup>1</sup> Allen v. United States, 164 U.S. 492 (1896).

Trial counsel testified that he spoke to Petitioner about this decision. App. 746, lines 10-16. However, trial counsel was unable to recall when this conversation took place and admitted that it might have occurred after the charge conference. App. 758, lines 18 – App. 759, line 8. Trial counsel also testified that after the charge conference Petitioner was unwilling to plead guilty to any charge. App. 730, lines 15-25.

At the hearing, the state never argued that there was any evidence of voluntary manslaughter. Instead, the state argued that Petitioner benefited from the charge because “instead of being found guilty of murder, he was found guilty of manslaughter.” App. 781, lines 17-19.

#### Order of Dismissal

The PCR court found that trial counsel employed a reasonable trial strategy in not objecting to an erroneous charge. App 798. The court also found that Petitioner was not prejudiced, noting that “[Petitioner] was convicted of voluntary manslaughter rather than murder.” App. 798.

#### **Discussion**

“Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.” State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). In order for a judge to charge voluntary manslaughter there must be some evidence of both sufficient legal provocation and heat of passion. State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011); see also, State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) (“The law to be charged must be determined from the evidence presented at trial.”). “[I]n order to constitute ‘sudden heat of passion upon sufficient legal provocation,’ the fear must be the result of sufficient legal provocation and cause the defendant to lose control and create an

uncontrollable impulse to do violence.” See State v. Starnes, 388 S.C. 590, 598, 698 S.E.2d 604, 609 (2010). Evidence of a struggle during an armed robbery is not sufficient legal provocation. State v. Tyson, 283 S.C. 375, 379, 323 S.E.2d 770, 772 (1984); see also, State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001).

The evidence presented at Petitioner’s trial did not support a jury instruction on voluntary manslaughter. Although there was testimony that decedent pulled a gun on Petitioner, alone, this is insufficient to give rise to an instruction on voluntary manslaughter. See Starnes, 388 S.C. at 597, 698 S.E.2d at 608 (“[A] defendant is not entitled to voluntary manslaughter merely because he was legally provoked.”). Merely being afraid is not enough to justify an instruction for voluntary manslaughter; a person must be “acting under an uncontrollable impulse to do violence and be incapable of cool reflection as a result of the fear.” Id., at 599, 698 S.E.2d at 609. The trial transcript is devoid of any evidence that Petitioner acted in sudden heat of passion.

Moreover, under the state’s theory of the case, there is was no legal provocation. At trial, the state’s theory of the case was that decedent was defending himself against an armed robbery. Therefore, the state’s own theory of the case does not coincide with voluntary manslaughter. See Shuler, 344 S.C. at 632, 545 S.E.2d at 819 (“A victim’s attempts to resist or defend himself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter.”).

Therefore, there was no evidentiary basis for instructing the jury on voluntary manslaughter.

#### Deficient Performance

In order for post-conviction relief to be granted based off ineffective assistance of counsel an applicant must prove that counsel was deficient and that he was prejudiced by counsel’s performance. See Strickland v. Washington, 466 U.S. 668 (1984). Even strategic

decisions made by counsel are deficient when they are objectively unreasonable. See Sanchez v. State, 351 S.C. 270, 276, 569 S.E.2d 363, 365-366 (2002). Courts have found that a trial strategy is objectively unreasonable when it is based upon a misunderstanding of the law. See e.g. Dawkins v. State, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001) (“Since the testimony was inadmissible hearsay, counsel’s failure to object to the introduction of that evidence fell below an objective standard of reasonableness.”); Matthews v. State, 350 S.C. 272, 565 S.E.2d 766, 767 (2002) (“[C]ounsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial.”); Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992) (“[W]e hold that trial counsel’s failure to discern the prejudicial effect of the judge’s comments and interpose the appropriate objections downgrades his representation to a level below an objective standard of reasonableness).

The PCR Court found that trial counsel employed a valid trial strategy in not objecting to the voluntary manslaughter instruction. However, this strategy invited the jury to ignore the law and render what was likely a compromised verdict in violation of Petitioner’s right to Due Process. See State v. Cooley, 342 S.C. 63, 70, 536 S.E.2d 666, 670 (2000) (“Since the jury heard no evidence of legal provocation, Defendant’s voluntary manslaughter conviction suggests that the jury may have compromised between murder and involuntary manslaughter or accident in reaching their verdict ... [t]his is a cautionary tale for solicitors as to the pitfalls of requesting a potential ‘compromise’ charge which is unsupported by the evidence. Although the result is an unsatisfactory one, this situation is controlled by the precedent of the United States Supreme Court which we cannot ignore.”).

Moreover, Petitioner consistently told counsel that he did not want to plead guilty to any charge. Therefore Counsel had no authority to expose him a possible sentence for voluntary

manslaughter when there was no evidence to support the charge. See Bookhart v. Janis, 384 U.S. 1 (1960) (holding that counsel may not override his client's decision not to plea and enter the functional equivalent to a guilty plea.); see also Rule 1.2 (a), RPC, Rule 407, SCACR ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.").

### Prejudice

The PCR court erred in finding that Petitioner was not prejudiced by assuming that the jury would have convicted him of murder if it had not been instructed on voluntary manslaughter. App. 798. The PCR Court noted, "[Petitioner] was convicted of voluntary manslaughter rather than murder." Essentially, the PCR Court found that Petitioner was not prejudiced by assuming that the jury would have convicted him of murder if not for the lesser-included offense. This assumption is improper. See Cooley, 342 S.C. at 70, 536 S.E.2d at 670 ("[I]t is fair to assume that at least one member of the jury may have believed the state's position that Defendant murdered Victim by shooting her with a shotgun in the face at close range. However, due to the error in granting the solicitor's request for a voluntary manslaughter charge, Defendant will not have to face a jury of his peers on the charge of murder again.").

Moreover, this assumption is discredited by the trial record which indicates that the jury deliberated for several hours and was given an Allen charge prior to convicting Petitioner of voluntary manslaughter.

II. Petitioner's conviction for voluntary manslaughter violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution where the record contains no evidence that Petitioner acted in the sudden heat of passion based upon sufficient legal provocation.

### **Relevant facts**

Petitioner incorporates by reference the factual recitation provided in Issue I, supra. In addition to the ineffective assistance of counsel claim raised in Issue I of this petition, Petitioner argues that the absence of evidence denied him due process. These were raised to the PCR court as distinct issues. App. 727, lines 9-14; App. 784, lines 13-23. However, the PCR court did not rule on this issue as a distinct issue from his ineffective assistance of counsel issue. App. 798. In a motion to reconsider, Petitioner requested that the PCR court rule on this issue. App. 802-803. In ruling on the motion to reconsider, the PCR court found “[Petitioner] has presented no justification for disturbing the Dismissal of the case and the prior Order.” App. 819.

### **Discussion**

In addition to the governing legal principles and analysis discussed below, Petitioner incorporates the relevant case law and analysis in Issue I, supra.

“[I]t is a violation of due process to convict and punish a man without evidence of his guilt.” Thompson v. City of Louisville, 362 U.S. 199 (1960). Nevertheless, Petitioner is currently serving a twenty-five year sentence for manslaughter despite the fact that both the state and trial attorney have indicated that there is no evidence to support a voluntary manslaughter charge. App. 156, lines 9-18; App. 157, lines 3-7; App. 745, lines 9- 16; App. 747, lines 9-15; App. 754, lines 2-7.

The Fifth, Sixth, and Fourteenth Amendments require that the state must prove each element of a crime beyond a reasonable doubt. See State v. Brown, 360 S.C. 581, 595, 602

S.E.2d 392, 400 (2004) (“[T]he United States Supreme Court recently has re-emphasized the constitutional protections of surpassing importance contained in the Fourteenth Amendment’s due process clause and the Sixth Amendment right to a jury trial, which indisputably entitle a defendant to a jury determination that he is guilty of every element of the crime which he is charged, beyond a reasonable doubt.” (internal quotations omitted)); see also, In re Winship, 397 U.S. 358 (1970) (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”); Jackson v. Virginia, 443 U.S. 307, 314 (1979) (“A meaningful opportunity to defend, if not the right to trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused.”).

It is inconceivable to say that a person was afforded due process of law when a court allowed the person to be convicted of a lesser offense when there was no evidence that he committed that offense. This is true even when there was evidence that would support the greater charge, of which the jury acquitted Petitioner. As stated previously, it is undisputed there is no evidence to support a charge of voluntary manslaughter; therefore, Petitioner was denied due process and his conviction must be overturned. See Thompson, supra.

III. In violation of Petitioner's right to the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution, trial counsel failed to request that the jury be instructed on the law of self-defense where evidence in the record indicated Petitioner acted in self-defense.

### **Relevant facts**

#### Facts produced at the trial

Evidence of self-defense permeated Petitioner's trial. In his opening statement, the prosecutor informed the jury that Petitioner's girlfriend, Farhonda<sup>2</sup> Pompey would testify that Petitioner told her what happened, including "the claim ... it was him or me." App. 305, lines 4-6. As the prosecutor promised, Pompey testified regarding her conversation with Petitioner after the shooting. Pompey picked up Petitioner on January 2, 2007 in Florence County when he called asking for a ride. App. 63, lines 17-22. While the two were discussing the events of the evening, Petitioner said, "It was either him or me." App. 74, lines 12 - 24. The deceased "pulled out a gun" and the two were fighting. App. 75, lines 22-24.<sup>3</sup> Petitioner did not say anything about trying to rob the deceased. App. 76, lines 5-11. The next day Petitioner had a bruise above his right eye, which he got from struggling with the deceased. App. 78, lines 4-12.

After the shooting, Petitioner and his girlfriend picked up Travis James walking down the street. App. 602, line 6 – App. 603, line 9. While in the car, Petitioner informed James that the deceased was dead. App. 603, line 20 – App. 604, line 5. James noticed Petitioner had a scratch on

---

<sup>2</sup> Ms. Pompey's first name appears in the record spelled Farhonda and Feronda.

<sup>3</sup> Michael Brandt, a police officer, responded to the Marion Police Department on May 29, 2007, where he recovered the deceased's nine millimeter pistol. Ballistics testing revealed the deceased's gun did not fire the casing found at the scene. App. 359, line 1 – App. 360, line 12.

his face. App. 604, lines 5-9. Additionally, Petitioner told James “it was either him or me” in connection with the shooting. App. 604, lines 15-21.

While arguing against Petitioner’s motion for directed verdict, the prosecutor used Petitioner’s statement “it was him or me” to support his position that substantial circumstantial evidence that Petitioner killed the deceased with malice aforethought existed. App. 109, lines 3-9. During the charge conference, the prosecutor requested an instruction concerning the lesser-included offense of voluntary manslaughter based upon Petitioner saying “it was either him or me.” App. 115, lines 11-22. However, when the judge inquired if the parties would like for him to charge self-defense, the prosecution objected, again referring to Petitioner’s statement – “it was him or me” – to argue against self-defense. Inexplicably, trial counsel agreed with the prosecution that self-defense was inapplicable. App. 125, line 5 – App. 126, line 25.

Finally, in closing arguments, the prosecutor used Petitioner’s statement – “it was him or me” – as his central argument for why the jury should convict. In fact, the prosecutor began his argument as follows: “I got a chain. I got a bag of weed. And it was him or me.” App. 132, lines 5-7. When countering any of Petitioner’s claims that someone else may have shot the deceased, the prosecution argued that Petitioner’s statement to Pompey and James that “it was him or me” was evidence that Petitioner was guilty. App. 155, lines 1-4; App. 164, line 25 - App. 165, line 1; App. 166, lines 14-17. After arguing the statement supported a guilty verdict, the prosecutor said “you’re not entitled to a charge on the law of self-defense if you’re robbing somebody and they try to defend themselves and you shoot them.” App. 155, lines 5-8. In fact, the prosecutor argued that if the jury believed Petitioner’s statement – “it was him or me” – meant that Petitioner “had to shoot” the deceased, then the jury should find him guilty of voluntary manslaughter. App. 156, line 19 – App. 157, line 1.

After the judge issued the instructions, the jury struggled to reach a verdict.<sup>4</sup> Within thirty minutes of beginning their deliberations, the jury requested written instructions of murder and manslaughter. App. 215, line 12 – App. 216, line 4. About an hour later, the jury requested to hear the testimony of Pompey and Petitioner’s statement again. App. 217, lines 16-19; App. 218, lines 14-17. After deliberating four and one-half hours, the jury was deadlocked. App. 221, line 17 – App. 222, line 3. Judge Anderson then charged the jury pursuant to Allen. App. 222, line 10 – App. 228, line 15. An hour later, the jury requested clarification on the differences between murder and voluntary manslaughter. App. 229, line 20 – App. 230, line 8. The judge instructed the jury again on the elements of murder and voluntary manslaughter. App. 230, line 23 – App. 235, line 19. Within ten minutes of the re-charge, the jury reached a verdict, finding petitioner guilty of voluntary manslaughter. The jury deliberated for approximately six hours. App. 235, lines 15-18; App. 238, lines 23-25.

#### Facts produced at the PCR hearing

Trial counsel’s strategy at trial was to convince the jury that Petitioner “didn’t do it.” App. 732, lines 10-11. The facts produced at trial, according to trial counsel, were that Petitioner and his co-defendants were at a house in Florence where Petitioner knew no one, including the deceased. While Petitioner was there, the deceased stopped to visit with the residents. The deceased appeared scared. Trial counsel wanted to convince the jury that because the deceased did not know Petitioner, then he was not acting scared of Petitioner, and that he was killed by the people in the house whom he feared. App. 732, line 16 – App. 733, line 6.

---

<sup>4</sup> Importantly, the judge’s instruction did not include a reference to felony murder – and the prosecution did not request such an instruction. App. 194, line 7 – App. 211, line 1.

Trial counsel admitted that Petitioner's girlfriend, Farhonda Pompey, gave a statement to law enforcement in which she claimed Petitioner told her it was "either him or me" when the two discussed the shooting. App. 733, lines 17-20; App. 734, line 9 – App. 735, line 5; App. 736, lines 8-15. Initially, trial counsel conceded that Pompey's testimony would have likely entitled Petitioner to a charge on self-defense. However, trial counsel quickly repudiated the idea by suggesting that the defense had no evidence of self-defense because "[Petitioner]'s story to me the entire time up to and during trial was he didn't have anything to do with it." Trial counsel "didn't want to get in front of the jury" and argue that Petitioner "didn't do it; it was somebody else, but just in case you do believe it was him, give us a self-defense charge." App. 737, lines 10-18. In his opinion, the jury would find him "silly" and he would lose all credibility with the jury if he had tried to make the dual arguments. Therefore, he did not request a charge on self-defense. App. 737, line 19 – App. 738, line 1; Tr. 738, lines 14-15. He further explained that he could not "make up a defense" that his client did not mention to him. App. 738, lines 9-11.

Additionally, trial counsel testified that based upon his understanding of self-defense, the defendant would be required "to put up some kind of evidence." App. 738, lines 7-8. Upon further questioning, he stated that "[t]o be successful," the defense would be required "to give the jury a little bit more than that one statement." App. 738, lines 19-20. Although trial counsel recognized that he was not required to argue self-defense to the jury in order to ask the judge for the instruction, he maintained doing so "would have been silly." App. 739, lines 10-21.

On cross-examination, trial counsel explained that his understanding of what was required in order to request a self-defense charge was a person could not "start a fight and then midstream claim self-defense if [the person] were the initial aggressor." Based upon the prosecution presented some evidence indicating Petitioner had robbed the deceased, trial counsel did not "think a self-defense

charge would have been appropriate.” He also did not believe “the jury would have agreed with a self-defense.” App. 751, line 16 – App. 752, line 6. Despite his earlier testimony regarding Petitioner’s statement to Pompey being evidence of self-defense, trial counsel inexplicably testified on cross-examination that he “didn’t see any evidence” of self-defense. App. 752, lines 7-9.

Further, trial counsel testified that because Petitioner never told him that he acted in self-defense, trial counsel “didn’t see how [he] could make a defense up out of [his] mind and ... ask for self-defense.” App. 752, lines 13 – 25. In fact, trial counsel testified that “[s]elf-defense was never on the radar and the reason it never came up was because all along [Petitioner] said, ‘I didn’t do it so I’m not going to say I did it.’” App. 753, lines 1-9.

Petitioner and trial counsel discussed self-defense one time. When Petitioner explained what happened, trial counsel advised him that self-defense was not available to him. App. 762, lines 6-17. Petitioner told trial counsel that on the night of the shooting, the deceased gave him “a look,” and then walked towards Petitioner. When the deceased “reached to pull out a weapon,” Petitioner and the deceased struggled. While they struggled, Petitioner tried to prevent the deceased from pulling his gun. Petitioner’s gun was jammed causing an unfired bullet to eject. Somehow, Petitioner’s gun became unjammed, and he was able to fire. App. 762, line 23 – App. 764, line 6; App. 765, line 22 – App. 766, line 3; App. 766, line 13 – App. 767, line 12. Petitioner denied ever telling trial counsel that he had nothing to do with it. App. 768, lines 19-22.

#### Order denying Petitioner relief

In his order denying Petitioner relief from his conviction, Judge Russo found trial counsel’s performance was not deficient in light of trial counsel’s reasonable trial strategy. Additionally, the PCR court found trial counsel’s conduct did not prejudice Petitioner. Concerning the testimony at trial, the order explained that trial counsel indicated self-defense was ““never even on the radar””

because Petitioner had never asked him to raise the defense or provided trial counsel with a factual basis for the defense. In fact, trial counsel never even discussed self-defense with Petitioner. The PCR court was persuaded by trial counsel's testimony that the defendant's theory of the case was that Petitioner was not at the scene.<sup>5</sup> As a result, trial counsel believed that a person could not claim self-defense and claim he was not present.

In direct contradiction of the alleged defense theory that Petitioner was not present at the scene, the order also referred to trial counsel's claim that self-defense would have been inconsistent with the known facts which were that the jury would likely believe that Petitioner started and fight if Petitioner had started the fight, he could not then claim self-defense. Additionally, the order explained that trial counsel believed Petitioner's refusal to testify would have decreased the likelihood of his ability to receive a charge on self-defense. App. 796-797. The order failed to address the fact that trial counsel not only failed to request a charge on self-defense, but trial counsel affirmatively informed the trial court that he did not want a charge on self-defense when the trial judge inquired.

### **Discussion**

"The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001); see also State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004). The trial court must charge self-defense if there is any evidence in the record "from which it can be reasonably inferred" that the accused acted in self-defense. State v. Burkhart, 350 S.C. 252, 260, 565 S.E.2d 298, 302 (2002); State v. Wigington, 375 S.C. 25, 649 S.E.2d 185, 188 (Ct. App. 2007).

---

<sup>5</sup> This contradicts all of the evidence presented at trial, Petitioner's statement to police, Petitioner's testimony at the PCR hearing, and most of trial counsel's testimony at the PCR hearing.

To establish self-defense, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief, or if the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in the particular instance. State v. Hendrix, 270 S.C. 653, 657-658, 244 S.E.2d 503, 505-506 (1978).

In State v. Light, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008), the South Carolina Supreme Court held a defendant's statement that it was either "her or me" after the defendant took the gun from the victim established that the defendant believed he was in imminent danger. The Court determined this belief was reasonable in light of the defendant's testimony that in the preceding weeks the victim had been acting jealous, had followed him, and told him that if she caught him with another woman it was "going to be messy." Id.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. To establish ineffective assistance of counsel, the Petitioner must satisfy the two-prong test set forth in Strickland v. Washington, 466 U.S. 668 (1984). "First, a defendant must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal

citations omitted). “The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. The defendant is required to overcome the presumption that counsel was effective in order to receive relief.” Id. at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, where ineffective assistance of counsel is alleged as a ground for PCR relief, the applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 692.

Trial counsel’s failure to request a charge on self-defense because he did not intend to argue self-defense to the jury during his closing was deficient performance where clear evidence in the record supported the charge. Petitioner was entitled to a charge on self-defense based upon the testimony of Pompey and James indicating that Petitioner said “it was either him or me” when referring to the shooting. The language used by Petitioner was almost identical to the language used in Light, supra. According to Pompey, Petitioner and the deceased struggled when the deceased presented a gun. Petitioner did not say anything to Pompey about trying to rob the deceased. Pompey’s testimony that the next day Petitioner had a bruise above his right eye, which he got from his fight with the deceased, further supported Petitioner’s contention that he and the deceased struggled. Even Travis James testified that Petitioner showed evidence of having been in a fight – scratches on his face. Trial counsel’s failure to request the instruction on self-defense was deficient performance.

The prejudice from trial counsel’s failure to request the instruction is evident from the jury’s deliberations. The jury struggled to reach a verdict because the instructions failed to provide all the avenues necessary for evaluating the case. Inclusion of voluntary manslaughter was error, as


explained in Issues I and II, supra, and confused the jury. The prosecutor argued that evidence supporting self-defense – “it was him or me” – could be used by the jury to find Petitioner guilty of voluntary manslaughter. The jury was left with no evidence of sudden heat of passion or sufficient legal provocation in the record, but asked to consider those elements in arriving at a verdict. The only evidence the jury could have used to support its verdict was the evidence argued by the prosecutor supported such a verdict, which was the very evidence that supported self-defense. The jury placed great weight upon Pompey’s testimony as shown by them asking to rehear it during deliberations.

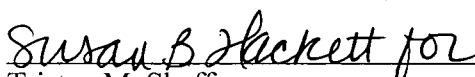
Trial counsel’s failure to request an instruction concerning self-defense was deficient performance prejudicing Petitioner. The lower court’s holding to the contrary relied upon facts unsupported by the record – that the defense theory was that Petitioner was not present at the crime scene. The lower court’s holding to the contrary relied upon an unreasonable assessment of trial counsel’s strategy and a finding that asking for self-defense would have been inconsistent with the strategy. For these reasons, Petitioner requests this Court reverse the decision of the PCR court.

CONCLUSION

Petitioner respectfully requests this Court reverse the decision of the PCR court. Concerning Issues I and II, Petitioner requests this Court reverse his conviction for voluntary manslaughter and hold he may not be retried on the charge because the state produced no evidence to support the charge. Concerning Issue III, Petitioner requests this Court reverse his conviction and remand for a new trial on voluntary manslaughter.

Respectfully submitted,

  
\_\_\_\_\_  
Susan B. Hackett  
Appellate Defender

  
\_\_\_\_\_  
Tristan M. Shaffer  
*Pro Bono*

ATTORNEYS FOR PETITIONER

This 4th day of November, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to Florence County  
Thomas A. Russo, Circuit Court Judge

---

DEVODUS ROUSE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

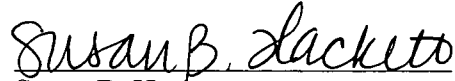
RESPONDENT

---

CERTIFICATE OF SERVICE

---

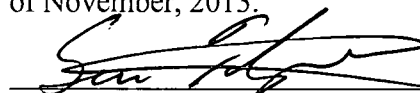
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Josh Thomas, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Devodus Rouse #332635, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 4th day of November, 2013.



Susan B. Hackett  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day  
of November, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.